AN APPELLATE PRIMER:

The ABC's of Appeals, Special Actions, & Post-Conviction Relief

May 4, 2012
Black Canyon Conference Center
Phoenix, Arizona

POST-CONVICTION RELIEF

Presented By:

DIANE MELOCHE

Deputy Maricopa County Attorney
Phoenix, Arizona

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Rd., Suite 202
Phoenix, Arizona 85015

PROSECUTOR'S SURVIVAL GUIDE
TO
RULE 32
POST-CONVICTION RELIEF
(non-capital)

* * *

I. How Rule 32 PCRs fit into the grand scheme.

II. Rule 32.4 – Timely Commencement of Proceedings:
- A) Pleading "Of-Right" Defendants
- B) Non-pleading Trial Defendants.

III. Rule 32.2(a) Preclusion
Rule 32.2(b) Exceptions to Preclusion

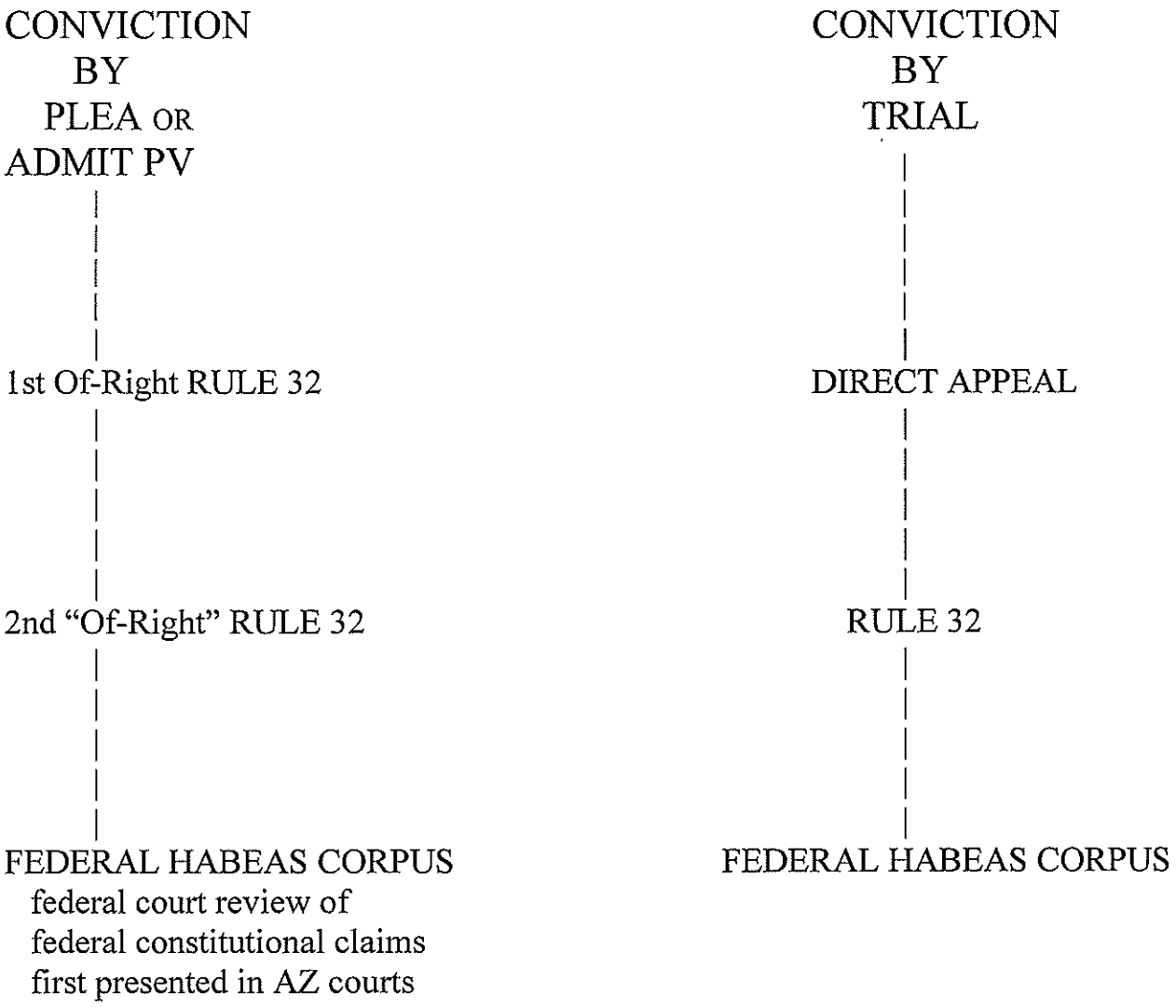
IV. Rule 32.1 Enumerated Grounds for Post-Conviction Relief

V. The Pleadings:
- A) Defendant's PCR Petition
- B) State's Response

VI. The Proceedings:
- A) Summary Dismissal
- B) Colorable Claim / Evidentiary Hearing
- C) Burdens of Proof
- D) What Happens if We Lose?
- E) Appellate Review

I.
THE OVERALL SCHEME

CONVICTED & SENTENCED:
then what?



II. TIMELINESS – RULE 32.4

The PCR proceeding is commenced by timely filing a PCR notice with the clerk of the court in which the conviction occurred. Rule 32.4(a).

PRACTICE POINT: Importance of pleading and litigating the issue of timeliness:

i) IMPACT IN STATE COURT:

Timeliness affects the types of claims that may be raised in the PCR petition:
--Timely Notice: any claim under Rule 32.1(a) through (h) can be raised;
--Untimely Notice: only claims under Rule 32.1(d) through (h) can be raised.

ii) IMPACT ON FEDERAL HABEAS PROCEEDING:

--Rule 32.4(a)'s time requirement is an "independent and adequate" state rule of procedure that poses an absolute bar to federal habeas corpus relief.

--A untimely PCR impacts the federal habeas statute of limitations.

A state court's ruling that a PCR proceeding was "untimely" will help preserve the state-court conviction from federal habeas review. Although a properly filed PCR proceeding tolls the federal 1-year statute of limitations, a state court's ruling that the PCR proceeding was "'untimely" eviscerates the " properly filed" nature of that PCR proceeding and, correspondingly, prevents the federal courts from utilizing that proceeding to toll the prisoner's 1-year limitations period. *See Lakey* v. *Hickman,* 633 F.3d 782, 785–86 (9th Cir. 2011) (holding that, under the principles of *Pace* v. *DiGuglielmo,* 544 U.S. 408, 414 (2005) and *Allen* v. *Siebert,* 552 U.S. 3, 5-7 (2007) *(per curium),* the state court's rejection of the state PCR petition as untimely meant that the untimely PCR petition "must be treated as improperly filed, or as though it never existed," and hence, "for purposes of section 2244(d), the pendency of that petition did not [statutorily] toll the [federal] limitations period").

PRACTICE POINT: "PRISONER MAILBOX RULE"

A *pro se* Δ's Rule 32 PCR notice is "filed" for purposes of the filing deadline, at the time he delivers it to prison authorities for mailing. *State v. Rosario* 195 Ariz. 264, 266, 987 P.2d 226, 228 (App. 1999), adopting *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L.Ed.2d 245 (1988)

--Δ's burden to establish timeliness (*e.g.,* present prison mail logs)
--may require evidentiary hearing.

PRACTICE POINT: 1992 Amendments to Time Limits:

If sentenced after Sept. 30, 1992: Rule 32.4(a)'s time limits apply.
If sentenced prior to Sept. 30, 1992:

Rule 32.4(a) time limits do not apply to a defendant who is filing his **first** PCR proceeding. *Moreno v. Gonzalez*, 192 Ariz. 131, 135, 962 P.2d 205, 209 (1998).

The 1992 amendment also abolished the right to direct appeal. § 13-4033(B)

A. OF-RIGHT DEFENDANT (Rule 32.1)

--entered plea of guilty or no contest
--admitted probation violation
--probation automatically violated based upon a plea of guilty or no contest

1. First Of-Right PCR Proceeding: Rule 32.4(a)

-- Notice due within 90 days of sentencing;
-- Rule 32.1(f): if Δ can establish failure to timely file was not his fault, the notice will be considered timely;
-- Timely notice permits *all* Rule 32.1 claims to be raised in PCR Petition.

2. Second "Of Right" PCR Proceeding: Rule 32.4(a)

--Notice due 30 days after 1st of-right PCR concludes by issuance of:
-trial court's final order denying relief in 1st PCR proceeding;
-appellate court's order denying review in 1st PCR proceeding;
-appellate court's mandate in 1st PCR proceeding.

--Timely Notice: permits ineffective assistance of counsel (IAC) claims against attorney who handled the 1st of-right PCR proceeding.
See State v. Pruett, 185 Ariz. 128, 912 P.2d 1357 (App. 1996).

--All other claims under Rule 32.1(a), (b), or (c) should be precluded under Rule 32.2(a). (See *infra* pp. 6–10.)

--Does Rule 32.1(f) apply to second PCR notice?
State v. Petty, 225 Ariz. 369, 372, ¶8, n. 1, 238 P.3d 637 (App. 2010) recognizes that the "of-right" designation is somewhat ambiguous.

> Rule 32.1(f): excuses the "failure to file a notice of post-conviction relief <u>of right</u> . . . within the prescribed time" if not Δ's fault.
>
> Rule 32.1 suggests that only the first PCR is the "of-right" proceeding: "Any person who pled guilty . . . shall have the right to file **<u>a</u>** post-conviction relief proceeding and **<u>this</u>** proceeding shall be known as a Rule 32 of-right proceeding."
>
> Rule 32.4(a) anticipates two PCR rounds in "of-right" proceedings: "In a Rule 32 of-right proceeding, the notice must be filed . . . within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first [PCR] proceeding."
>
> But this would give an of-right Δ an advantage not available to a trial Δ who can never use 32.1(f) to save an untimely PCR notice.

B. NON-PLEADING DEFENDANTS — PCR AFTER TRIAL:

-- found guilty by court or jury verdict
-- unsuccessfully contested probation violation
-- have right to pursue direct appeal under Rule 31.

1) PCR Notice must be filed within the *later* of:
   -- 90 days after entry of judgment and sentence or
   -- 30 days after issuance of the final order or mandate in the direct appeal

   If Δ appeals, the PCR Notice may be filed *at any time prior to the expiration of the 30 days* following issuance of the appellate mandate. *State v. Jones,* 182 Ariz. 432, 897 P.2d 734 (1995).

   --If an appeal is pending, the trial court is required to send a copy of the PCR Notice to the appropriate appellate court. Rule 32.4(b)
      --The appellate court, on motion of any party or on its own initiative, may stay the appeal pending the outcome of the PCR. Rule 31.4(a).
         --In Maricopa County, the usual practice is to permit Δ to dismiss early PCR notice without prejudice to refilling within 30 days after mandate issues in the direct appeal.

2) An untimely PCR Notice filed by a non-pleading Δ cannot be saved under Rule 32.1(f). If notice is untimely, claims are restricted to those in Rule 32.1(d) – (h).

C. APPOINTMENT OF COUNSEL — Rule 32.4(c)(2):

Counsel must be appointed if requested by indigent defendant upon the filing of a timely **or** first PCR notice:
-- first PCR for pleading and trial Δs regardless if timely (includes pre-1992 Δs)
-- second "of-right" PCR if timely filed. *Osterkamp v. Browning,* 226 Ariz. 485, 250 P.3d 551 (App.2011)
Is discretionary in all other non-capital cases (*i.e.,* successive PCRs).

D. DISCOVERY:

A defendant has no general right to pre-petition discovery, but the State has an obligation to produce any *Brady* material. *Canion v. Cole,* 210 Ariz. 598, 599, ¶¶ 8–9, 115 P.3d 1261 (2005). After the PCR petition is filed, a defendant can request discovery and the trial court may order it if the request is related to issues raised in the petition.

III. PRECLUSION — Rule 32.2(a)

A. WHAT IS IT?

Preclusion is an absolute bar to relief on certain claims raised in the PCR petition *and* can limit review in a future federal habeas proceeding.

B: PURPOSE:

--To "limit review and prevent endless or nearly endless reviews of the same case in the same trial court." *Stewart v. Smith,* 202 Ariz. 446, 450, ¶ 10, 46 P.3d 1067 (2002.)

--To avoid piecemeal litigation by "requiring a defendant to raise all known claims for relief in a single petition to the trial court." *State v. Rosales*, 205 Ariz. 86, ¶ 12, 66 P.3d 1263, 1267 (App. 2003).

C: STATE'S BURDEN:

The State must "plead and prove" any ground of preclusion by a preponderance of the evidence standard. (The State can affirmatively waive preclusion—never recommended.)

But, any court *may* find a claim precluded regardless of whether the State raises preclusion. *See State v. Espinosa*, 200 Ariz. 503, 29 P.3d 278 (App. 2001) (noting that State had not plead or proven preclusion but the rule and statute allowed the court *sua sponte* to find the claim precluded).

D. TYPE OF CLAIMS SUBJECT TO PRECLUSION — Rule 32.2(b):

Only the following claims are subject to preclusion:

Rule 32.1(a): any constitutional claims challenging conviction and sentence;

Rule 32.1(b): claims challenging the court's jurisdiction to render judgment or impose sentence;

Rule 32.1(c): claims challenging legality of sentence.

E. THE RULES OF PRECLUSION—Rule 32.2(a):

There are three specific—and **independent**—rules that apply depending on the situation.
-- By definition, only ONE rule of preclusion can apply to a particular claim.
-- Identify the correct rule and argue accordingly.

Rule 32.2(a)(1) precludes relief on a claim that is *still* "raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24."

--Applies only to non-pleading (trial) Δs who have right to appeal;
--Comes into play when Δ files a PCR before direct appeal has been perfected;
--Refers to Rule 24 motions but highly likely that Rule 24's very narrow time limits will expire before PCR petition is filed [will be the rare case where this applies]

SIDE NOTE: Effective 12/1/00, the word "still" disappeared from subsection (a)(1). However, the 2002 Comment to the Rule explains that (a)(1) precludes relief for any claims that "still may be considered" by a trial court under Rule 24, or an appellate court under Rule 31.

Rule 32.2(a)(2) precludes relief on a claim that *was raised* in a direct appeal or a prior PCR proceeding *and* was adjudicated on the merits.

-- Applies to both pleading and non-pleading defendants;
-- Prohibits successive "bites at the apple" on the same claim.
-- There must have been a ruling on the merits of the substantive claim in the direct appeal or prior PCR proceeding.

Rule 32.2(a)(3) precludes relief on a claim that *was not raised* in the trial court proceeding, on appeal, or in any previous collateral proceeding -- QUINTESSENTIAL "WAIVER"

--Applies to both pleading and non-pleading Δs.

i) *No Fundamental Error Review*:
Unlike on direct appeal, there is no fundamental error review in PCR to excuse waiver; that would eviscerate this rule of preclusion.
State v. Swoopes, 216 Ariz. 390, 403 ¶ 42, 166 P.3d 945, 958 (App. 2007).

ii) *How to establish waiver*:

1) For most claims, the State may simply show that the defendant did not raise the claim at trial, on appeal, or in a prior PCR proceeding. *Stewart v. Smith*, 202 Ariz. 446, 449, ¶8, 46 P.3d 1067, 1070 (2002.).
e.g.: Δ failed to submit supplemental *pro se* brief in *Anders*-type appeal, or did file but failed to raise that particular claim.

2) Limited class of rights requiring personal waiver:
Rights that are of "sufficient constitutional magnitude" require a knowing, voluntary, and intelligent (personal) waiver.

Depends merely on the particular right alleged to have been violated. *Stewart v. Smith*, 202 Ariz. at 450, ¶ 10, 46 P.3d at 1071 offers a non-inclusive list of rights requiring Δ's personal waiver:
waiver of right to counsel; waiver of the right to jury trial; waiver of right to 12-person jury.

3) Waiver by Entry of Guilty Plea:
Entry of a valid guilty plea forecloses a defendant from raising substantive non-jurisdictional defects. *State v. Hamilton*, 142 Ariz. 91, 94, 688 P.2d 983, 986 (1984); *State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708 (App. 2008); *State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993).

--Entry of valid plea waives all constitutional claims occurring prior to entry of guilty plea. *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602 (1973).
E.g.: speedy trial violations, *Miranda* violations; involuntary confessions; 4th Amendment issues; etc.

--Proof of voluntary waiver:
i) Rule 17 colloquy; Δ's responses to court's questions;
ii) Express waivers contained in plea agreement:
MCAO plea agreements contain express waivers:
"Unless this plea is rejected by the court or withdrawn by either party, the Defendant hereby waives and gives up any and all motions, defenses, objections, or requests that he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement.

iii) *No requirement to address the merits of precluded claims:*
If the claim is one that does not require Δ's personal waiver, there is no need to argue the merits of the claim, *i.e.*, whether the right was actually violated.

PRACTICE POINTS—State court proceedings:

1) Preclusion applies only to *substantive* claims under Rule 32.1(a), (b), and (c). Preclusion does not apply to IAC claims "bootstrapped" onto otherwise precluded claims.

Example: In PCR petition, Δ alleges a *Miranda* violation.
-- If pleading Δ, this substantive claim is waived/precluded by virtue of entry of valid guilty plea.
-- If trial Δ, this substantive claim is waived/precluded because he did not raise it on direct appeal.
BUT if Δ claims that his trial attorney was ineffective for not recognizing the alleged *Miranda* violation, the IAC claim is NOT precluded.

2) IAC claims can be waived/precluded if not timely raised:
--IAC claims against trial/appellate counsel must be raised in a timely first PCR petition. *State v. Spreitz*, 202 Ariz. 1, 2 ¶ 4, 39 P.3d 525, 526 (2002).
NEW EXCEPTION: trial Δ represented by same attorney on appeal and first PCR can raise IAC/appellate counsel claim in second PCR. *State v. Bennett*, 213 Ariz. 562, ¶¶ 14–16, 146 P.3d 63, 67 (2006).
--IAC claims against counsel in first of-right PCR must be raised in the second "of-right" PCR.

PRACTICE POINTS—Federal habeas proceedings:

The distinction between preclusion under Rule 32.2(a)(2) and (a)(3) is extremely important for purposes of federal habeas review.

A claim that is precluded under subsection (a)(2) is a classic example of "exhaustion" because that claim has been presented to the state court and, therefore, can be considered by the federal court in a habeas proceeding.

In contrast, a claim that has been waived/precluded under subsection (a)(3) is procedurally defaulted and, therefore, the federal court cannot consider that claim (unless Δ does something that doesn't concern us in the Rule 32 proceeding). *See Martinez v. Ryan,* 566 U.S. _, 132 S. Ct. 1309, 1316 (2012) ("There is no dispute that Arizona's procedural bar on successive petitions is an independent and adequate state ground[,]" the enforcement of which bars federal review); *Stewart v. Smith,* 536 U.S. 856, 861 (2002) (finding Rule 32.2(a)(3) is an "independent" state procedural rule that bars federal habeas review); *Cook v. Schriro,* 538 F.3d 1000, 1026 (9th Cir. 2008) ("Preclusion of issues for failure to present them at an earlier proceeding under Arizona Rule of Criminal Procedure 32.2(a)(3) are 'independent of federal law because they do not depend upon a federal constitutional ruling on the merits.'") (footnote omitted; quoting *Smith,* 536 U.S. at 860).

Therefore, it is very important to distinguish between (a)(2) and (a)(3).

Never argue alternative grounds of preclusion for the same claim—such as a claim is precluded because it either was or could have been raised on direct appeal or in a previous post-conviction proceeding. Such broad statements will not be respected on federal habeas review and

will open up the state court judgment to the federal courts' review on the merits of the claim. *See Valerio v. Crawford*, 306 F.3d 742, 774 (9th Cir. 2002) (reversing the district court's procedural-default finding because the state court "failed to specify which claims had been previously presented to the state court and could not be relitigated, and which had never been presented to state court and had been waived"). Instead, you must independently argue why each clam is precluded and persuade the trial court to rule accordingly.

"In the alternative . . . ."

If it is a run-of-the-mill claim that is clearly precluded, there is no need to address the merits of the precluded claim, which actually might encourage the trial court to issue an unclear ruling. If you feel compelled to address the merits *after arguing preclusion,* make sure your argument is clearly framed "in the alternative."

The trial court held ...what?

If the trial court's ruling denying relief is unclear—*e.g.,* a particular claim is "precluded because it either was or could have been raised" earlier or the preclusion ruling is intertwined with a ruling on the merits—consider filing a motion for clarification. If the trial court's ruling is unclear, the federal courts will presume that the trial court actually ruled on the merits–as opposed to ruling on preclusion–and then the federal courts will have permission to review the merits of the federal claim. *See Harris v. Reed*, 489 U.S. 255, 263-64 (1989) (holding that "a procedural default does not bar consideration of a federal claim . . . unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar[,]" and emphasizing that "a state court need not fear reaching the merits of a federal claim in an alternative holding . . . as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision.") (internal quotation marks omitted).

G. CLAIMS NOT SUBJECT TO PRECLUSION –Rule 32.2(b)

-- "The preclusion rules exist to prevent multiple post-conviction reviews, not to prevent review entirely." *State v. Rosales*, 205 Ariz. 86, ¶ 12, 66 P.3d 1263 (App. 2003).

-- Therefore, claims arising under Rule 32.1(d), (e), (f), (g), and (h) are exceptions to the rules of preclusion and can be raised in an untimely or subsequent PCR.

-- Even so, Rule 32.2(b) expressly requires a Δ to provide a good explanation in the PCR notice why the claim has not been raised earlier. Absent a sufficient explanation, the notice is subject to summary disposition.

> When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, **the notice shall be summarily dismissed.**
> (Emphasis added).
>
> *See State v. Harden*, 228 Ariz. 131, ¶ 4, 263 P.3d 680, 681 (App. 2011) (finding no abuse of discretion when trial court summarily dismissed proceeding based on an insufficient notice).

PRACTICE POINT: Move for summary dismissal if the PCR notice is deficient.

IV. RULE 32.1 – ENUMERATED GROUNDS FOR RELIEF:

A defendant must comply strictly with Rule 32 by asserting in the PCR Petition only those grounds for relief listed in Rule 32.1. A court has no jurisdiction to rule on the merits of a PCR petition where no ground cognizable under Rule 32 is asserted. *State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984); *State v. Manning*, 143 Ariz. 139, 141, 692 P.2d 318, 320 (App. 1984).

-- *in other words*, if the asserted claim cannot be pigeon-holed into one of the enumerated grounds, it is not cognizable under Rule 32.1 and relief is unavailable.

Rule 32.1(a): The conviction or sentence was in violation of the Constitution of the United States or of the State of Arizona.

A) INEFFECTIVE ASSISTANCE OF COUNSEL — most common claim:
Right to effective assistance at trial, at sentencing, on direct appeal (but not in PCR after direct appeal), at probation revocation proceedings, in plea context, and in 1st of-right PCR.

2-Prong Test: *Strickland v. Washington,* 466 U.S. 668 (1984):

1) Δ must show deficient performance:
must specify acts/omissions that allegedly fell below an objective standard of reasonableness as defined by prevailing professional norms;

performance in plea context:
must allege "specific facts which would allow a court to meaningfully assess why that deficiency was *material* to the plea decision." *State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App.1998) (emphasis added.)

2) Δ must show prejudice:
trial counsel: must demonstrate a reasonable probability that the verdict might have been affected by the error. *Strickland,* 466 U.S. 694.

appellate counsel: must demonstrate a reasonable probability that but for counsel's deficient performance, the outcome of the appeal would have been different. *State v Herrera,* 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

if plea accepted & no trial:

must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985).

if plea lapsed or was rejected & convicted at trial:

must show a reasonable probability that, but for counsel's deficient performance:

i) he would have accepted earlier, more favorable plea to reduced charge(s) and/or lesser sentence;
ii) trial court would have accepted that plea;
iii) prosecutor would not have withdrawn that plea.

Missouri v. Frye, 132 S. Ct. 1399, 1409 (2012)
Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012).

IAC – PCR counsel:

non-pleading defendant: no constitutional right to effective assistance in PCR following direct appeal. *State v. Armstrong*, 176 Ariz. 470, 474–75, 862 P.2d 230, 234–35 (App. 1993) citing *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 2566 (1991).

pleading defendant: has the right to effective assistance of counsel in 1st of-right proceeding only; that IAC challenge must be brought in timely 2nd "of-right" proceeding. *State v. Pruett,*185 Ariz. 128, 912 P.2d 1357 (App. 1996);

IAC PRACTICE POINTS:

1) Conclusory allegations, generalizations, or speculation do not establish a colorable IAC claim. *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985); *State v. Rosario*, 195 Ariz. 264, 268, ¶ 23, 987 P.2d 226, 230 (App. 1999). **Δ must offer specifics.**

Examples:

failure to interview witness: identify witness by name? what would that person have said? how is it relevant to an issue in the case? would that witness have testified at trial? will that witness testify if an evidentiary hearing is granted?

insufficient consultation: what was the deficiency? what difference additional consultation would have made?

2) Although Δ's failure to satisfy both *Strickland* prongs is fatal to an IAC, **ALWAYS ADDRESS BOTH PRONGS.**

Under the federal habeas statute now in effect, 28 U.S.C. § 2254(d), a state court's ruling on the merits of an ineffective assistance of counsel claim under *Strickland* is entitled to deference by federal courts. However, if the state court resolves an ineffectiveness claim on only one *Strickland* prong, there is no state-court merits-ruling on the other prong so there is nothing to defer to. In such a case, the federal court will examine the remaining prong *de novo*. *See Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542 (2003) (because no state court analyzed the prejudice prong, federal court analysis is "not circumscribed by a state court conclusion.") Therefore, to preserve the deference due to our State courts' decisions, address the merits (or lack thereof) of each prong of the *Strickland* test.

B) <u>OTHER CONSTITUTIONAL CLAIMS RAISED IN PCR PETITION:</u>
This is where preclusion under Rule 32.2(a)(2) and (a)(3) come into play.

TRIAL DEFENDANTS:

Review the constitutional claims that were raised on direct appeal:
-- Rule 32.2(a)(2) preclusion applies if the claim was raised and addressed on direct appeal.
-- Rule 32.2(a)(3) preclusion applies if the claim should have been–but was not–raised on direct appeal.

Except for IAC claims, all other constitutional claims should be precluded at this point.

PLEADING DEFENDANTS:

Except for IAC and "involuntary plea" claims, all other constitutional claims will be precluded by entry of valid plea.

Rule 32.1(b): The court was without jurisdiction to render judgment or to impose sentence.

2007 Comment: "Paragraph (b) retains the basic attack on jurisdiction universally recognized as a ground for collateral attack. See ABA, Standards, supra, at § 2.1(a)(iii)."

Claim of illegal sentence does not implicate court's subject matter jurisdiction. *State v. Bryant*, 219 Ariz. 514, ¶ 17, 200 P.3d 1011, 1015 (App. 2008)

This ground is subject to preclusion under Rule 32.2(a). *But see Rojas v. Kimble*, 89 Ariz. 276, 279, 361 P.2d 403, 406 (1961) (subject matter jurisdiction cannot be waived and may be raised at any time).

Rule 32.1(c): The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law.

OK: Illegal, excessive sentence or probationary term.
State v. Peek, 219 Ariz. 182, 183, ¶ 8, 195 P.3d 641, 642 (2008).

Not OK: Request to modify or terminate probation.
State v. Dean, 226 Ariz. 47, 51, 243 P.3d 1029, 1033 (App. 2010)

This Rule does not permit attacks on the conditions of imprisonment, on correctional practices, or prison rules.

This ground is subject to preclusion under Rule 32.2(a)(3). *State v. Shrum*, 220 Ariz. 115, 118, 203 P.3d 1175, 1178 (2009) (illegal-sentence claim is subject to preclusion for failure to raise in prior PCR).

Rule 32.1(d): The person is being held in custody after the sentence imposed has expired.

To be a cognizable claim, Δ must establish that he is in custody when he should otherwise be physically released from imprisonment—and not "released" to begin serving a consecutive sentence. *State v. Davis*, 148 Ariz. 62, 64, 712 P.2d 975, 977 (App.1985)

Includes claims of miscalculation of sentence or computation of early-release credits that result in Δ's remaining in custody when he otherwise should be free.

Is not intended to include attacks on the conditions of imprisonment, on correctional practices, or prison rules.

Rule 32.1(e): Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence.

"Simply because defendant presents the court with evidence for the first time does not mean that such evidence is 'newly discovered.'" *State v. Mata*, 185 Ariz. 319, 333, 916 P.2d 1035, 1049 (1996).

The Rule sets out a 3-part test, which Arizona case law has elaborated into a 5-part test. Δ must satisfy each requirement to be entitled to relief under this Rule.

(1) the evidence was discovered after trial although it existed before trial;
(2) that it could not have been discovered and produced at trial through reasonable diligence;
(3) that it is neither cumulative nor impeaching, unless the impeachment evidence substantially undermines critical trial testimony;
(4) that it is material; and
(5) that it probably would have changed the verdict or sentence.

State v. Bilke, 162 Ariz. 51, 52–53, 781 P.2d 28, 29–30 (1989);
State v. Mauro, 159 Ariz. 186, 766 P.2d 59 (1988).

-- The trial court may properly assess the credibility of the new evidence in determining whether or not it would have probably changed the outcome at trial. *State v. Serna,* 167 Ariz. 373, 807 P.2d 1109 (1991).

Rule 32.1(f): The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part.

"Freebie" PCR – has no preclusive effect on future PCR proceedings; is a procedural device only seeking relief in the form of filing a delayed notice of appeal (non-pleading defendants) or 1st "of-right" PCR notice. *State v. Rosales*, 205 Ariz.86, 66 P.3d 1263(App. 2003).

--Δ must prove by preponderance of the evidence that failure to timely file was NOT his fault (if any doubt, evidentiary hearing needed).

--Does not apply to a non-pleading defendant who files an untimely PCR notice

Rule 32.1(g): There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence.

PRACTICE POINT SHORT ANSWER: New procedural rules do not apply if Δ's conviction was final when the new rule was announced.

1) **Arizona statutes are presumptively not retroactive:**
"Unless a statute is expressly declared to be retroactive, it will not govern events that occurred before its effective date." Thus, absent a clear expression of retroactivity, a newly enacted law applies only prospectively. *Garcia v. Browning*, 214 Ariz. 250, 151 P.3d 533 (2007)

2) **Appellate decisions:**

a) What is a "significant change in the law" (a/k/a "a new rule")?
An appellate decision that breaks new ground; imposes a new obligation on the States or the Federal Government, or was not dictated by precedent existing at the time the defendant's conviction became final.
Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257 (1990); *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003); *State v. Shrum*, 220 Ariz. 115, 118, 203 P.3d 1175, 1178 (2009)

→ If NOT a new rule, stop here.

b) If new rule, does it apply to this Δ?
i) Is it a substantive change? *If YES, applies to everyone.*
Substantive law/rules:
--define crimes;
--address burdens of proof, "quantum of evidence" to convict;
--determines length or type of punishment;
E.g.: An appellate decision interpreting a statute in a way that de-criminalizes conduct for which Δ was convicted is a new substantive rule. *See Bousley v. U.S.*, 523 U.S. 614 (1998)

ii) Is it a procedural change? *If yes, does not apply to final convictions.*
Procedural rules:
--relate to fact-finding procedures to ensure a fair trial;
--manner, means, method of proceeding.

Finality: occurs when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.
State v. Towery, 204 Ariz. 386, 64 P.3d 828 (2003).

iii) Only a "watershed" rule of criminal procedure would apply retroactively. BUT to date, the United States Supreme Court has yet to find a new rule that falls under this exception, but in "providing guidance" as to what might qualify, has pointed to the right-to-counsel rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Beard v. Banks*, 542 U.S. 406 (2004)

EXAMPLE OF NOT A "SIGNIFICANT CHANGE IN THE LAW":
State v. Shrum, 220 Ariz. 115, 117, 203 P.3d 1175, 1177 (2009) (holding that *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007), did not constitute a "significant change in the law" for Rule 32.1(g) purposes.)

EXAMPLES OF "SIGNIFICANT CHANGES" THAT DO NOT APPLY RETROACTIVELY:

Ring v. Arizona, 536 U.S. 584,122 S. Ct. 2428 (2002) (*Ring II*), which held that a jury must decide whether Aggravating circumstances exist in capital cases, was a significant change in the law that did not apply retroactively to those defendants whose cases were final).
State v. Towery, 204 Ariz. 386, 64 P.3d 828 (2003)

Padilla v. Kentucky, 130 S. Ct. 1473 (2010), applying *Strickland* to immigration advisement was a significant change in the law for purposes of Rule 32.1(g) but it did not apply retroactively to convictions that were final when the new rule was announced.
State v. Poblete, 227 Ariz. 537, 539, 260 P.3d 1102, 1104 (App. 2011)

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), does not apply retroactively to cases on collateral review. *State v. Febles*, 210 Ariz. 589, ¶¶ 1, 11, 115 P.3d 629, 631, 633 (App.2005)

Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply retroactively to persons whose convictions were final when the rule was announced. *State v. Sepulveda*, 201 Ariz. 158, ¶ 4, 32 P.3d 1085, 1086 (App. 2001)

Rule 32.1(h): Actual innocence.

The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.

--Comment to 2000 Amendment: The addition of new subparagraph (h) is warranted by the U.S. Supreme Court's pronouncement that claims of actual innocence are not cognizable under the federal habeas corpus remedy. *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993). This claim is independent of a claim under subparagraph (e). A defendant who establishes a claim of newly discovered evidence does not need to comply with the requirements of subparagraph (h).

--A.R.S. § 13–4240 providing for post-conviction DNA testing was also enacted in 2000

--No reported cases (so far) addressing the substance of an actual innocence claim. However, *State v. Swoopes,* 216 Ariz. 390, 404 ¶¶ 46–47, 166 P.3d 945, 949 (App. 2007) is an example of how this defendant pointed to non-compelling evidence in an unsuccessful attempt to prove his innocence.

V. THE PLEADINGS:

A) DEFENDANT'S PETITION:

1) CERTIFICATION Required by Rule 32.5:
--Petition must include a certification that Δ has included every ground known to him for relief.
--Of-right *pro se* Δ must personally sign certification included in 1st PCR petition; will support waiver/preclusion arguments in subsequent PCRs
--Δ who is represented by counsel in 1st PCR should personally sign the certification. Although Δ is generally bound by counsel's decisions under "well-settled principles of agency law," *Coleman v. Thompson*, 501 U.S. 722, 753–54, 111 S. Ct. 2546 (1991), of-right Δs can raise IAC claims against 1st PCR counsel in 2nd PCR proceeding.

--Move to strike deficient petition under Rule 32.5:
- Trial court must return petition to Δ for revision
- Δ has 30 days to refile compliant petition or risk dismissal w/ prejudice
- State's response time begins on date compliant petition is refiled.

2) Δ's SWORN STATEMENT (AFFIDAVIT):
--Facts within Δ's personal knowledge must be separately alleged under oath.
--Facts are those necessary to support the claims in the petition:
- especially important for IAC claims;
e.g.: in plea context, Δ must state that he would/would not have accepted/rejected plea, etc.
--Failure to submit sworn factual affidavit = claim not colorable.

3) OTHER ATTACHMENTS:
-- Rule 32.5 requires the attachment of "[a]ffidavits, records or other evidence" to support the allegations contained in the petition.
-- Bare allegations without supporting evidence are insufficient to show a colorable claim. *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985); *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App. 2000)

4) 25-Page Limit:
--Move to strike oversized petitions.

5) No amendments are permitted–except by leave of court upon showing of good cause–after the PCR petition has been filed. Rule 32.6(d).

6) Δ's REPLY: New claims presented for the first time in Δ's reply are waived/precluded; impermissible attempt to amend petition without leave of court. *State v. Lopez* 223 Ariz. 238, 221 P.3d 1052 (App. 2009)

B) STATE'S RESPONSE – Rule 32.6(a)

1) ATTACHMENTS

--Rule 32.6(a) permits the State to submit affidavits, records or other evidence that contradict the allegations in the PCR petition.

--IAC claims: submit sworn affidavits from trial/appellate counsel contradicting each of Δ's claims.

VI. THE PROCEEDINGS:

A) SUMMARY DISMISSAL — Rule 32.6(c)

Court may dismiss if it finds from the pleadings and record that all of Δ's non-precluded claims are frivolous, *i.e.,* no material issue of fact or law, and that it would not be beneficial to continue the proceedings.

B) EVIDENTIARY HEARING — Rule 32.8

Court must order hearing if "colorable claim"—which is one that "has the appearance of validity, *i.e.*, if the defendant's allegations are taken as true, would they change the verdict?" *State v. Richmond*, 114 Ariz. 186, 194, 560 P.2d 41, 49 (1977).

The decision whether a claim is colorable and warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

C) BURDENS OF PROOF AT EVIDENTIARY HEARING – Rule 32.8(c)

Defendant: prove allegations of fact by preponderance of evidence.

State: if Δ proves a constitutional defect, the State must prove the defect harmless beyond a reasonable doubt.

D) WHAT HAPPENS IF WE LOSE?

1) Order the transcript of the evidentiary hearing [Rule 32.8(e)] if plan to file a motion for rehearing or petition for review.

2) Motion for Rehearing – due 15 days after trial court's ruling issues. Rule 32.9(a)

3) Petition for Review – due 30 days after final decision on the PCR Petition or motion for rehearing. Rule 32.9(c)

4) Stay Pending Review Rule 32.9(d)

-- *If new trial ordered*: order is automatically stayed if motion for rehearing or petition for review filed; stay in effect until final review is completed.

BE PREPARED: Δ will move for reconsideration of release conditions. *State ex rel. Berning v. Alfred,* 186 Ariz. 403, 405, 923 P.2d 869, 871 (App. 1996) (determination of release and release conditions are matters the trial court may address at any time under Rule 7).

-- *If any other relief granted to* Δ: stay pending further review is discretionary with the trial or appellate court.

E) APPELLATE REVIEW:

1) Petition for Review – Arizona Court of Appeals:
Follow Rule 32.9(c)

2) Motion for Reconsider — Arizona Court of Appeals:
Rule 32.9(g) directs you to follow Rule 31.18

3) Petition for Review – Arizona Supreme Court:
Rule 32.9(g) directs you to follow Rule 31.19